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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

AMERADA HESS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner Amerada Hess Corporation ("Hess") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 24, 1980.

QUESTIONS PRESENTED

1. Whether gross negligence on the part of the government in causing a pre-indictment delay of eight years deprives a defendant of due process of law where the defendant is actually prejudiced at trial due to the delay.

2. Whether the government's failure to inform the defendants in an antitrust criminal action of the series of acts from which the government contends a conspiracy may be inferred deprives the defendants of their sixth amendment rights to be

informed of the nature and cause of the accusation where the government prosecutor stated before trial that said acts would not be at issue.

3. Whether petitioner was deprived of a fair trial in a criminal antitrust case by reason of the trial court's role in creating and issuing to the press prejudicial publicity and the court's subsequent failure to take or permit appropriate remedial action to ascertain the impact of such publicity on the jury.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were: United States of America, Appellee; Hess, Society of Independent Gasoline Marketers of America (SIGMA), Ashland Oil, Inc., Kayo Oil Company, The Meadville Corporation, Petroleum Marketing Corporation and Robert R. Cavin, Appellants.

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OPINION BELOW

The opinion of the Court of Appeals, reported at 624 F.2d 461 (4th Cir. 1980), appears in the Appendix hereto, p. A1.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 24, 1980 (time of day not recorded). This was a decision on rehearing, superseding the Court's initial decision and judgment entered December 26, 1979. In its opinion of June 24, 1980, the Court, although leaving unchanged its earlier disposition with respect to Hess, Kayo, Meadville and PMC, modified that judgment as to another party, Ashland. The United States filed a petition for rehearing and suggestion for rehearing *en banc* as to Ashland. That petition for rehearing was denied on August 5, 1980. An extension of time to October 14, 1980, to file this petition was granted petitioner by order of this Court, dated September 30, 1980. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

This petition is premised on:

1. United States Constitution, Fifth Amendment, which in pertinent part provides:

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . "

2. United States Constitution, Sixth Amendment, which provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

3. this Court's supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts,

4. Rule 17.1(a) of this Court, which in pertinent part provides for discretionary review of cases where

"a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

STATEMENT OF THE CASE

Petitioner was among 12 defendants indicted in the District of Maryland on June 1, 1976, for an alleged violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1976). The charge was that the defendants had conspired to raise, fix, maintain and stabilize the retail price of gasoline in a six-state area along the Atlantic coast from Virginia to New York.

The indictment in this case followed a decision in May, 1975, in a civil case making similar allegations in the District of Maryland against Crown Central Petroleum Corporation ("Crown"), one of the defendants in the trial court below. In his decision, the Court (Judge Alexander Harvey II), after a non-jury trial, upheld the plaintiffs' claims of a horizontal price-fixing conspiracy among Crown, Hess and other independent marketers. *Phillips v. Crown Central Petroleum Corp.*, 395 F. Supp. 735 (D. Md. 1975). On April 6, 1977, the Court of Appeals for the Fourth Circuit vacated injunctive relief granted the plaintiffs and remanded for a hearing in light of perjured testimony by one plaintiff. *Phillips v. Crown Central Petroleum Corp.*, 556 F.2d 702 (4th Cir. 1977).

A little over a month later, on May 23, 1977, trial of the criminal proceeding commenced before Judge Blair in the District of Maryland. On the last day of testimony, August 18, 1977, Judge Blair admonished the jury not to listen to, view or read any news accounts of the trial. With this instruction the jury was dismissed until the following Tuesday.

On the very next day, Friday, August 19, 1977, Judge Blair's colleague, Judge Harvey, completed his decision on remand of the *Phillips* case. *Phillips v. Crown Central Petroleum Corp.*, 1977-2 Trade Cases ¶ 61,599 (D. Md. 1977). Without forewarning to counsel for Crown or any other defendants in the criminal case, the opinion was released *to the press* by Judge Harvey's chambers that same day, August 19. Prior to issuing his decision, Judge Harvey had consulted with Judge Blair and asked whether issuance of the opinion "could con-

ceivably affect the criminal trial." Judge Blair approved release of the opinion on August 19 without requesting a postponement, despite the inflammatory content of the opinion and the fact that the jury was scheduled to be sequestered shortly. The opinion was neither served on Crown nor filed in the Clerk's office prior to its release to the press.

On Saturday, August 20, 1977, the Baltimore Sun, which had carried almost daily stories about the three-month trial, published an article on Judge Harvey's decision under a banner headline. The article referred specifically to the pending criminal case and to the parties involved, including petitioner Hess, SIGMA, Kayo, Meadville and PMC, and specifically noted the connection between the criminal and civil case. The article proceeded to quote Judge Harvey's opinion on remand as follows:

> Crown has persistently during the years violated the antitrust laws, not in one respect but in many respects . . . Crown has combined with competitors horizontally in fixing retail prices of gasoline in the Baltimore metropolitan area . . . [and has entered] illegal horizontal combinations with certain competitors.
>
> * * *
>
> Whether or not the prosecutors in [the] criminal case can convince the jury of Crown's guilt beyond a reasonable doubt, this court is satisfied that the plaintiffs in this case have proved by a preponderance of the evidence that Crown combined with competitors during the years in question to fix retail prices.

On Monday, August 22, 1977, defendants moved for a mistrial. The court refused to hear argument on the motions. An additional request for a hearing regarding the circumstances of the release of Judge Harvey's opinion was denied.

Finally, on August 25, 1977, after two days of closing arguments, Judge Blair asked the jury a series of questions about their exposure to publicity. He referred to two time

frames—the first from the beginning of trial until August 18, the day of the recess, and the second, from the time of the recess until the present:

> My questions are very simple, and they are prefaced first at the various times that I have instructed you and reiterated to you, too often, as you may view it, that you were not to read, view, listen to any news accounts, that you were not to discuss this case among yourselves as to the merits or the substance of what you heard in this Courtroom . . . [H]as anyone advertently or inadvertently *violated those instructions* in any way, up until 4:00 last Thursday afternoon?
>
> [No response.]
>
> Stated otherwise, had you talked about it with each other, have you viewed, listened or read any news reports or anything of that kind?
>
> [No response.]
>
> I take it by your silence and interpret your silence to mean that indeed you have not viewed, listened to or read any news reports or *in any way violated my instructions,* is that correct?
>
> [No response.]
>
> The second time frame is from 4:00 last Thursday afternoon, or whatever moment it was that we adjourned this court on Thursday, until today, now, this moment, which includes of course this past weekend.
>
> Has any one of you viewed, listened or read any news reports either about this case or about any of the parties to this case, excepting the United States only, but any of the party Defendants?
>
> [No response.]
>
> No one. You are positive?
>
> [No response.]

> You all understand the question, and you are all indicating that you do. Has any one of you in any other way *violated the instructions that I gave you at that time?*
>
> [No response] (emphasis supplied).

The defendants objected, arguing that the trial court should have polled the jury immediately after the publicity and that the jurors should have been polled on an individual basis. Objection was also made to the intimidating nature of the court's inquiry in asking whether the jurors had "violated his instructions," thus requiring an admission (if it were the fact) that they had committed a contempt of court.

On August 30, 1977, the jury returned a verdict of guilty against seven of the defendants, including petitioner, all of which had been named in the Baltimore Sun article on Judge Harvey's opinion in the *Phillips* case. Crown was acquitted. A motion was made to interview the jury regarding the effects of trial publicity on the verdict, but Judge Blair denied it. Likewise, Judge Blair denied a motion for the court itself to conduct interviews on the jury's exposure to such publicity.

REASONS FOR GRANTING THE WRIT

I

GROSS NEGLIGENCE ON THE PART OF THE GOVERNMENT RESULTED IN AN UNREASONABLE PRE-INDICTMENT DELAY OF EIGHT YEARS, WHICH SEVERELY PREJUDICED THE DEFENDANTS AT TRIAL AND WHICH DEPRIVED THEM OF DUE PROCESS OF LAW.

Petitioner Hess adopts the argument regarding this issue made by Kayo Oil Company, The Meadville Corporation and Petroleum Marketing Corporation, defendants and appellants below, in their Petition for a Writ of Certiorari filed on the same date as this petition.

II

A FAILURE ON THE PART OF THE GOVERNMENT TO INFORM THE DEFENDANTS IN AN ANTITRUST CRIMINAL ACTION OF THE SERIES OF ACTS WHICH THE GOVERNMENT CONTENDS SHOWS A CONSPIRACY DEPRIVES THE DEFENDANTS OF THEIR SIXTH AMENDMENT RIGHT TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION, WHERE THE GOVERNMENT PROSECUTOR STATED BEFORE TRIAL THAT SAID ACTS WOULD NOT BE AT ISSUE.

Petitioner Hess adopts the argument regarding this issue made by Kayo Oil Company, The Meadville Corporation and Petroleum Marketing Corporation, defendants and appellants below, in their Petition for a Writ of Certiorari filed on the same date as this petition.

III

PETITIONER WAS DEPRIVED OF A FAIR TRIAL BY REASON OF THE TRIAL COURT'S ROLE IN CREATING AND ISSUING TO THE PRESS PREJUDICIAL PUBLICITY AND THE COURT'S FAILURE TO TAKE OR PERMIT APPROPRIATE REMEDIAL ACTION TO ASCERTAIN THE IMPACT OF SUCH PUBLICITY ON THE JURY.

The conduct of the trial court in this case was a blatant departure from the "accepted and usual course of judicial proceedings" and thus constitutes grounds for exercise by this Court of its power of review. In the past this Court has not hesitated to exercise its supervisory power to protect the integrity of the federal courts, such as in cases involving improper conduct by federal officials. *McNabb v. United States,* 318 U.S. 332 (1943). *See also United States v. Payner,* 100 S. Ct. 2439, 2450-51 (1980) (Marshall, J., dissenting).

Moreover, this Court has repeatedly emphasized that trial courts must exercise strict supervision over the course of proceedings to ensure that the accused receives a trial by an impartial jury free from outside influences, particularly prejudicial publicity. *Sheppard v. Maxwell,* 384 U.S. 333, 362-63 (1966); *Estes v. Texas,* 381 U.S. 532, 550-52 (1965). This Court has also held that jury exposure during trial to certain types of publicity, such as a defendant's prior criminal conduct—evidence clearly inadmissible in a pending criminal proceeding—has a high potential for prejudice and, on those grounds, reversed a conviction in the exercise of its supervisory powers over the federal courts. *Marshall v. United States,* 360 U.S. 310 (1959). *See also Murphy v. Florida,* 421 U.S. 794, 797-99 (1975); *United States v. Williams,* 568 F.2d 464, 469-70 (5th Cir. 1978); *United States v. Herring,* 568 F.2d 1099, 1103-06 (5th Cir. 1978).

Indeed, cases have on occasion involved the dissemination of prejudicial material to the press by prosecutors and law

enforcement officials. *See Sheppard v. Maxwell, supra; Rideau v. Louisiana,* 373 U.S. 723 (1963). As this Court observed in *Sheppard v. Maxwell, supra* at 363,

> The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

Most recently, this Court has emphasized the trial judge's affirmative constitutional duty to deal with prejudicial publicity:

> The capacity of the jury . . . to decide the case fairly is influenced by the tone and extent of the publicity, which is in part, and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage. *The trial judge has a major responsibility. What the judge says about a case, in or out of the courtroom, is likely to appear in newspapers and broadcasts.* More important, the measures a judge takes or fails to take to mitigate the effects of pretrial publicity . . . may well determine whether the defendant receives a trial consistent with the requirements of due process.

Nebraska Press Association v. Stuart, 427 U.S. 539, 554-55 (1976)(emphasis supplied). *See also Gannett Co. v. DePasquale,* 443 U.S. 368, 378 (1979).

The issue for review in this case—the conduct of Judges Blair and Harvey—strikes at the very integrity of the federal judicial system. The question here is not simply whether Judge Blair, in light of possible jury exposure to trial publicity, erred in conducting the interrogation on a collective, as opposed to an individual, basis. *Cf. United States v. Capo,* 595 F.2d 1086 (5th Cir. 1979), *cert. denied sub nom. Lukefahr v. United*

States, 100 S. Ct. 660 (1980); *United States v. Hankish,* 502 F.2d 71 (4th Cir. 1974). This case involves publicity itself generated by the court, together with subsequent suppression by the court of inquiry regarding the facts surrounding the publicity or its impact on the jury.

The issuance of the *Phillips* opinion to the press on August 19, 1977 was a clear violation of Canon 3(A)(6) of the Code of Judicial Conduct, which mandates that:

> A judge should abstain from public comment about a pending or impending proceeding in any court and should require similar abstention on the part of court personnel subject to his direction and control . . . .

As Justice Brennan has observed,

> As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair adminstration of justice.

Nebraska Press Association v. Stuart, supra at 601 n.27 (concurring in judgment). Judge Harvey's remarks in his opinion about the pending criminal case were totally gratuitous and unnecessary to his decision on the merits of the case before him. Moreover, issuing the opinion to the press without even so much as filing it with the Clerk or notifying Crown precluded the possibility of any objection to the publicity. The effect was to disseminate a message to the Baltimore community at a critical moment—after the close of evidence and just prior to sequestration of the jury—that at least in one Judge's opinion the defendants were guilty as charged.

After the initial error in issuing the opinion was committed, Judge Blair refused to permit any examination of the circumstances surrounding release of the opinion. Moreover, rather than taking immediate action, the court delayed five days

before even asking the jurors about their exposure to publicity. *Cf. United States v. Perrotta,* 553 F.2d 247, 249 (1st Cir. 1977)("the judge is required immediately to conduct some form of examination"); *Mares v. United States,* 383 F.2d 805, 809 (10th Cir. 1967)("the trial court should have immediately ascertained whether any jurors had been exposed [to the publicity]").

But then the Court, rather than seeking out facts, posed a barrage of threatening queries, asking in effect whether any of the jurors had committed a contempt of court. The bare transcript, although clear on its face, cannot fully convey the court's threatening tone and demeanor—to which the attorneys who were present can attest. Finally, the trial court repeatedly refused to sanction any inquiry by the defendants, not only denying their motion for a hearing on the circumstances surrounding the issuance of the opinion, but also issuing a "gag" order preventing the defendants from talking with the jurors individually after trial about the publicity. Judge Blair thus effectively foreclosed any outside examination of the misconduct.

Although rendering two lengthy opinions on a host of other questions, the Court of Appeals ignored the judicial misconduct below for reasons unknown. To permit that result to stand implies that at least in the Fourth Circuit the strictures routinely applied to attorneys and other officers of the court do not govern trial judges. Although this particular case may involve a petitioner in a class not always favored in the current political climate, it raises a fundamental issue about the standards of judicial conduct that should protect all defendants in all criminal proceedings, regardless of their size or the nature of the alleged offense. By the exercise of its supervisory powers in this case, this Court can make clear that trial courts have an

affirmative obligation not only to protect jury verdicts from the taint of inflammatory publicity but also to refrain from igniting that publicity in the first instance.

Respectfully submitted,

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October 14, 1980

APPENDIX

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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-2515

UNITED STATES OF AMERICA,
Appellee,

versus

SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA,
Appellant.

No. 77-2516

UNITED STATES OF AMERICA,
Appellee,

versus

AMERADA HESS CORPORATION,
Appellant.

No. 77-2517

UNITED STATES OF AMERICA,
Appellee,

versus

ASHLAND OIL, INC.,
Appellant.

No. 77-2518

UNITED STATES OF AMERICA,
Appellee,

versus

KAYO OIL COMPANY,
Appellant.

No. 77-2519

UNITED STATES OF AMERICA,
Appellee,

versus

THE MEADVILLE CORPORATION,
Appellant.

No. 77-2520

UNITED STATES OF AMERICA,
Appellee,

versus

PETROLEUM MARKETING CORPORATION,
Appellant.

No. 77-2521

UNITED STATES OF AMERICA,
Appellee,

versus

ROBERT R. CAVIN,
Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore.
C. Stanley Blair, District Judge.

Argued: January 9, 1979 Decided December 26, 1979
OPINION UPON REHEARING Filed: June 24, 1980

Before FIELD, Senior Circuit Judge, and WIDENER and HALL, Circuit Judges.

Wilbur D. Preston, Jr. (Nevett Steele, Jr., Gerson B. Mehlman, Whiteford, Taylor, Preston, Trimble and Johnston; A. T. Biggers, Continental Oil Company, on brief) for Appellant Kayo Oil Company; John H. Lewin, Jr. (Benson E. Legg, Venable, Baetjer & Howard; Adlai S. Hardin, Jr., Milbank, Tweed, Hadley & McCloy; Howard B. Myers, Amerada Hess Corporation on brief) for Appellant Amerada Hess Corporation; William Simon (Ray S. Bolze, Roger C. Simmons, Howrey & Simon; Robert H. Compton, Ashland Petroleum Company on brief) for Appellant Ashland Oil, Inc; Robert E. Nagle, Donald T. Bucklin (Wald, Harkrader & Ross on brief) for Appellant Robert R. Cavin; David F. Albright (Richard M. Kremen, Franklin T. Caudill, Semmes, Bowen & Semmes on brief) for Appellant Petroleum Marketing Corporation; (Philip L. Cohan, David Freeman, Ginsburg, Feldman & Bress on brief) for Appellant The Meadville Corporation; (David A. Donohoe, Jay A. Zeiler, Akin, Gump, Strauss, Hauer and Feld on brief) for Appellant Society of Independent Gasoline Marketers of America; Frederic Freilicher, John J. Powers, III, Department of Justice (John H. Shenefield, Assistant Attorney General; Rodney O. Thorson, James F. Ponsoldt, Department of Justice on brief) for Appellee, United States of America.

FIELD, Senior Circuit Judge:

On June 1, 1976, an indictment was returned in the District of Maryland against The Society of Independent Gasoline Marketers of America ("SIGMA"), Amerada Hess Corporation ("Hess"), Ashland Oil, Inc. ("Ashland"), Continental Oil Company ("Continental"), Crown Central Petroleum ("Crown"), Kayo Oil Company ("Kayo"), The Meadville Corporation ("Meadville"), Petroleum Marketing Corporation ("PMC"), Robert R. Cavin ("Cavin"), Norman Goldberg ("Goldberg"), Charles J. Luellen ("Luellen") and W. H. Burnap ("Burnap"). The indictment, drawn in one count, charged that the defendants had violated Section 1 of the Sherman Act, 15 U.S.C. § 1, prior to its 1974 amendments, by engaging in a conspiracy to fix prices for the retail sale of gasoline in unreasonable restraint of commerce.

After extensive pretrial proceedings, the trial commenced on May 2, 1977, and at the conclusion of the Government's case the district court granted the motions of three of the individual defendants, Luellen, Goldberg and Burnap, for judgments of acquittal. The trial continued as to the remaining defendants, and on August 30, 1977, the jury returned verdicts of not guilty with respect to Crown and Continental and guilty as to SIGMA, Hess, Ashland, Kayo, Meadville, PMC and Cavin.[1] Judgments of conviction were entered pursuant to the jury's verdicts and the convicted defendants have appealed.

In an opinion filed December 26, 1979, the panel unanimously affirmed the convictions of all of the defendants except Ashland. Similarly, the panel unanimously reversed the conviction of Cavin. With respect to Ashland, a majority of the panel affirmed the conviction, Judge Widener dissenting. Petitions for rehearing and rehearing en banc were filed, and upon the suggestion that the case be reheard en banc less than a majority of the judges in regular active service voted in favor thereof. Accordingly, rehearing en banc is denied. On the

[1] Cavin was employed by SIGMA in January of 1972 and was appointed Executive Director of the Society in November of that year.

petitions for rehearing, however, a majority of the panel are now of the opinion that the conviction of Ashland must be reversed. Additionally, the panel is of the opinion that our disposition of Cavin's appeal must be modified. To that effect, we withdraw our prior opinion anf file the present opinion in lieu thereof.

I

During the period covered by the indictment, and for many years prior thereto, gasoline was sold to motorists through essentially two different types of retail service stations. "Major brand" stations sold the gasoline of major companies, e.g., Exxon, Texaco, Gulf, etc., and in many instances were operated by dealers who were not employees of the major companies. These stations bore brand names that were widely advertised and sold brand name products, including tires, batteries and parts. Many of them offered repair service and accepted recognized company credit cards. "Private brand" stations, on the other hand, offered gasoline under names which were not widely advertised, e.g., Redhead, Kayo, Scatt, etc., and were usually manned by individuals who worked directly for the company which owned the stations. Private brand stations ordinarily offered few products other than gasoline, and spent little money, if any, for media advertising.

With these differences in service, such stations competed with the major brands almost exclusively upon the basis of price. The private brand stations attracted customers from the majors by pricing their gasoline several cents a gallon below that of the major brand stations in the same locale, and as a result the price of major brand gasoline imposed a "ceiling" on private brand prices. In other words, to be competitive the private brand retailer was required to maintain a sufficiently attractive "differential" between his price and that of the majors. Because they were selling gasoline at less than that charged by the majors, the profit margin of the private brand stations was reduced to a a marginal level, and the volume of a private brand's sales was vitally important. In the highly competitive private brand market volume was, of course,

significantly related to price. As a result, the private brand company, in the operation of a local station, took into account in pricing its gasoline from day-to-day not only the price charged in that locale by the major brand stations, but the prices charged by other independents in the same market.

During the period in question the companies which operated private brand stations had available a certain amount of current and accurate data relative to pricing patterns in the major brand gasoline market from a publication known as "Platt's Oilgram." This established trade newspaper conducts price surveys of the majors and publishes such pricing data for major brand markets throughout the country, including advance announcements of upcoming wholesale price moves by the majors. Much information, however, which was vital to the private brand companies could not be gleaned from Oilgram. Oilgram carried little news of major brand retail price behavior on a station-by-station or "street-basis," and such information was highly important to the private brand companies since their competitive vitality depended upon the ability of their individual retail outlets to undercut at all times the prices charged by neighboring major brand stations. More significantly, Oilgram carried practically no news concerning other private brand retailers' price behavior, either present or future, nor any analysis of the potential impact of major brand market behavior upon the private brand market.

In part to fill this void, the private brand retailers formed a trade association called The Society of Independent Gasoline Marketers of America ("SIGMA"). SIGMA's members were firms and individuals operating private brand stations in various parts of the country. Its board of directors and officers were elected from the membership and its day-to-day operations were managed by a full-time salaried director and his supporting staff. Ordinarily the membership met in convention on a semi-annual basis. SIGMA was characterized at trial by the defendants as an "oral Platt's Oilgram" for independents. It collected information from various sources (including telephone calls to and from private brand companies in which the

companies would discuss upcoming market decisions), and it would relay such information to its members, usually by telephone. Information provided by SIGMA to its members included the behavior of independents and majors in adjoining markets, the impact of wholesale prices on retail price structures, upcoming price moves by other independents, opportunities for increased prices or the perceived need for decreases, and generally such other data which might be of assistance to the members in meeting their competition.[2]

The indictment charged that the defendants, in effectuating the conspiracy to fix prices, "used SIGMA as a clearing house for gasoline pricing information in order to coordinate price increases and to eliminate discounting and settle pricing disputes," and that they "met at the occasion of SIGMA meetings and discussed pricing strategy, including the coordinated increase of retail gasoline prices and the curtailment and elimination of price cutting and discount practices." The indictment alleged that this use of SIGMA, supplemented by telephonic or other contact between the several defendants with respect to coordinated price increases and agreements, had resulted in the stabilization of artificial and non-competitive prices of gasoline, the effect of which was to restrain competition among the defendants and their co-conspirators.

II

In their joint brief the defendants make the prefatory charge that they "were convicted of criminal price fixing for exchanging information on prices," and assert that no conviction has ever been sustained on such evidence in a highly competitive market of which the participants had a relatively minimal share. In making this contention the defendants draw heavily upon the Supreme Court's recent decision in *United*

[2] SIGMA also lobbied on behalf of its members, conducted public relations programs, and informed members of adoption and interpretation of government regulations. It is, of course, conceded that none of these activities were germane to the charges in the indictment.

States v. U. S. Gypsum Co., 438 U.S. 422, 98 S. Ct. 2864, 57 L.Ed. 2d 854 (1978). *Gypsum* involved the practice of inter-seller price verification, a practice which is not, in itself, unlawful *per se.* The Government contended that such an exchange of price information was violative of Section 1 of the Sherman Act if it had either the purpose or the effect of stabilizing prices. The Court held, however, that an effect on prices, without more, would not support a criminal conviction, and that it was necessary to show that such a consequence was intended by the alleged participants.

There is a marked difference between the case before us and the one considered by the Court in *Gypsum.* Here the indictment charged the defendants with a conspiracy to fix prices, and the "exchange of information" was merely one of the activities by which the alleged agreement was effectuated. "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*" *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940). Since in a price-fixing conspiracy the conduct is illegal *per se,* further inquiry on the issues of intent or the anti-competitive effect is not required. The mere existence of a price-fixing agreement establishes the defendants' illegal purpose since "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." *United States v. Trenton Potteries,* 273 U.S. 392, 397, 47 S.Ct. 377, 379, 71 L.Ed. 700 (1926).

III

The principal challenge of the defendants is that the Government failed to offer sufficient evidence to prove the conspiracy which was charged in the indictment. The indictment defined the geographical area of the conspiracy as the "Middle Atlantic states" of New York, Pennsylvania, New

Jersey, Delaware, Maryland and Virginia, as well as the District of Columbia. The defendants maintain that it was necessary for the Government to demonstrate a single continuing conspiracy to fix gasoline prices *throughout* the entire Middle Atlantic region, and contend that the only evidence of the area-wide coordination of price moves related to general increases in November, 1970, July, 1971, and August of 1972. The defendants acknowledge that there were area-wide increases on those occasions, but assert that the evidence failed to show that they were the result of any price-fixing agreement. On the contrary, they suggest that the evidence clearly showed that the price moves on these three occasions were the result of economic forces at work in the market place over which the defendants had no possible control.

The defendants argue that other than those three occasions, the Government's evidence, at best, proved nothing but a series of "local and isolated incidents occurring within the Middle Atlantic states, involving some of the defendants and co-conspirators at different, and shorter, periods of time." Even if we were to accept the defendants' criticism of the probative quality of the evidence on the three area-wide increases, we think the Government's evidence with respect to the various local markets was proper for the consideration of the jury. Under the indictment the conspiracy embraced an agreement not only to fix prices on an area-wide basis, but also to establish prices in local markets within the region and to effectuate price changes on a coordinated basis. The Government's evidence of the single conspiracy implemented in this manner was not merely circumstantial in nature. The Government's witnesses, many of whom were employed by the corporate appellants, testified concerning the nature and intent of their pricing communications, and their testimony was augmented in many respects by the contemporaneous records of the defendants. Our review of the record persuades us that the evidence was sufficient to support the conclusion of the jury that the defendants were working together for the accomplishment of their common purpose to fix prices within the geographical area described in the indictment.

We are further of the opinion that the court's instructions to the jury were consistent with the indictment. The court instructed the jury that the defendants were charged with a "single, continuing conspiracy" to fix prices of gasoline in the Middle Atlantic states and, adverting to the evidence with respect to local pricing incidents, emphasized that "if you find that a defendant engaged in isolated incidents of gasoline price fixing, but was not a party to a single overall conspiracy covering the six-state area and the District of Columbia area, you must find that defendant not guilty of the matters charged in the indictment." This language, we think, made it crystal clear to the jury that their consideration of the evidence should be addressed to the ultimate issue of a single overall conspiracy.

IV

Defendants also claim that there was a fatal variance of proof from the original indictment, the bill of particulars, and the pre-trial stipulation of the parties. Much of what we have said with respect to the sufficiency of the evidence applies equally to this contention of the defendants which, in large degree, is predicated upon their argument that the indictment required a showing of continuous area-wide price manipulation. As we have noted, there was substantial evidence to support the jury's finding of guilt and, assuredly, the defendants were not convicted upon a charge that was not specified in the indictment, nor were they uninformed of the charge against them. Additionally, the charges and specifications found within the four corners of the indictment, the bill of particulars, and the pre-trial stipulation not only informed the defendants of the charges against them, but are sufficiently clear to allow the defendants to assert double jeopardy in the event of any future prosecution for the same conduct.

V

We find no merit in the defendants' charge that the trial court improperly denied their request for a more detailed bill of particulars. Pursuant to a stipulation entered into five months

prior to trial, the Government supplied the defendants with copies of all grand jury testimony, access to all documents subpoenaed from nondefendants; all documents voluntarily submitted to the Government by third parties in the course of the investigation; and all available *Brady* material. In further compliance with the stipulation the defendants received copies of all trial exhibits thirty days prior to trial, as well as a list of intended witnesses and Jencks Act material fourteen days prior to trial. In the light of this extensive disclosure by the Government there was no abuse of discretion by the trial court in declining to require the Government to supply the further information requested by the defendants. *See United States v. Schembari,* 484 F.2d 931 (4 Cir. 1973).

VI

The Government's case against the defendant, Ashland, was based primarily upon the theory that Ashland exercised direct control over the retail operations of five of its subsidiary corporations, including Payless Stations, Inc. ("Payless").[3] One of the Government's principal witnesses on the question of Ashland's control was a former vice-president of Payless,[4] who was in charge of its pricing for the period from 1963 through 1973, and who was employed by the company from 1956 through December of 1973. This witness provided direct testimony of Ashland's control over its subsidiaries. His testimony also included other information regarding the participation of Ashland and Payless in the conspiracy and the relationship of Payless with SIGMA.

This key witness had been hospitalized for psychiatric problems on two separate occasions in Our Lady of Peace Hospital in Louisville, Kentucky, and counsel for Ashland subpoenaed the hospital records. They were produced by the

[3] The other subsidiaries were Hi-fy Gasoline Stations, Inc.; Bi-lo Stations, Inc.; Southern Oil Co.; and Red Head Oil Co.

[4] This witness will be referred to from time to time as the "witness," "vice-president," "key-witness," or "former vice-president."

hospital administrator who was directed to deliver them to the district judge. After examining the records *in camera,* the judge advised counsel that they reflected two periods of hospitalization, the first being from July 26 to August 29, 1966, and the second from November 20 until December 24, 1968, and that the hospitalizations involved "a mental disorder or illness at that time."

Concluding that the disclosure of the records was within his discretion, the district judge declined to deliver them to counsel for the reason, among others, that he did "not know to what extent the Government's examination of the witness will include questioning during the relative period" (App. Vol. 3, at 777, 778). In making this ruling, however, the district judge stated that he was not foreclosing counsel for Ashland from questioning the witness about the two periods of hospitalization, but that he would rule on the questions as the cross-examination of the witness developed.

The hospital records were sealed by the district judge and after this appeal was filed Ashland moved this court for leave to examine such records. The motion was denied with the provision that counsel for Ashland might renew the motion at the time of oral argument. Following oral argument we granted Ashland's counsel access to the records and they were jointly examined by counsel for Ashland and the Government. Based on this examination of the hospital records, with leave of the court, both Ashland and the Government filed supplemental briefs on the issue of the relevancy of these records.

Counsel for Ashland contends that in denying access to the hospital records the trial court prejudicially impaired Ashland's ability to effectively cross-examine the witness. Ashland argues, among other things, that the hospital records were significant for the purpose of evaluating the witness' perceptive ability during the period in question and suggests, for instance, that if the witness were suffering from paranoia, he might have taken an irrational view of his communications with Ashland and interpreted simple inquiries as commands or binding directives.

As we have noted, the first period of the witness' hospitalization was from July 26 to August 29 of 1966, which was prior to Ashland's acquisition of Payless and also prior to the alleged conspiracy. However, the second period of hospitalization from November 20, 1968, to December 21, 1968, fell within the period of the conspiracy which was alleged to have existed from "at least as early as 1967 * * * and continuing thereafter until November 1974."

The record discloses that the vice-president in question was admitted to the hospital on the first occasion because of work-related problems. Significantly, the 1966 records show that a "supervisor" at work brought him to the hospital, and that he believed that "people at work were plotting against him." The official diagnosis indicated that his problems stemmed from his employment rather than being home-related. The 1968 records show that he was "manic depressed and admitted in psychotic state." The records also state that he "still tends to push himself," and contained observations that he was "delusional and hallucinatory with poor judgment and insight." Although the 1968 records do not specifically state that this was a continuation of his work-related problems, the jury might reasonably have drawn such an inference had the contents of the records been disclosed to them during the cross-examination of the witness. The official records incident to the 1968 visit state the final diagnosis as "Schizophrenic Reaction, Schizo-affective Type." On that occasion the "mental status examination" reflected that the patient was manic in behavior and quite talkative, and that he spoke of his experience with God.

It occurs to us that the hospital records should have indicated to the district court that the witness' hospitalization in 1966 was work-related and that it was quite probable that his 1968 illness was of a similar nature. The records should also have indicated to the court that the witness' judgment during both periods of illness was seriously impaired, and that a jury could have concluded that his ability to make rational observa-

tions was highly questionable. The records would further indicate that the patient had not fully recovered when he was discharged from the hospital in 1968 since they point out that his condition required further psychiatric treatment and continued medication.

Bearing in mind that the case against Ashland was based upon its alleged direct control over the retail operations of its subsidiaries, including Payless, it is clear that the testimony of the former vice-president was vital to the Government's case. Ashland had acquired control of Payless in 1967 and the witness testified that "Ashland, from the time that they acquired the company [Payless] until the time that I left, assumed gradually more and more control." At another point, in testifying concerning Ashland's control of prices of Payless the witness stated "this was a growing thing that started in 1968, when Ashland bought it and extended up until at the end, when they were saying what and where and how to price, not just because of the shortage of gasoline, but because they were taking direct control from Ashland's offices in Ashland, Kentucky." It should be noted that during at least a part of this period in 1968 about which the witness testified, he was experiencing acute mental problems with a hospital record which disclosed that he was "delusional and hallucinatory with poor judgment and insight," and was "secluded for his own welfare." Despite this fact, the court forbade Ashland from reviewing the hospital records or putting them to any effective use in the cross-examination of the witness.

Even if it is fair to assume that the hospital records had no direct bearing upon the witness' mental capacity at the time he testified, they were unquestionably relevant in regard to his perception of the events involving his work at Payless during the time of his unfortunate illness, and had a significant bearing upon his ability to testify at trial concerning his recollection of those events. *United States v. Partin,* 493 F.2d 750 (5 Cir. 1974), is the leading case in this field, and is quite similar to the case before us. In that case, one Rogers was a key government witness, just as the former vice-preisdent was here. Rogers had

been admitted to a Veterans Administration Hospital for treatment for mental illness. The hospital record revealed that Rogers had stated he was having auditory hallucinations and at times he thought he was some other person. The trial court rejected the admission of the hospital record either as a predicate for cross-examination or as a basis upon which another psychiatrist could have given an opinion as to the mental state of the witness Rogers as that may have had an effect on Rogers' ability to see and hear accurately during the period in which the events occurred about which he was testifying.

The court of appeals reversed the conviction because of the trial court's error in failing to admit the hospital records, reasoning at page 762:

> "It is just as reasonable that a jury be informed of a witness' mental incapacity at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing. It all goes to the ability to comprehend, know, and correctly relate the truth."

And again on page 763 appears the following:

> "Partin [the defendant] had the right to attempt to challenge Rogers' credibility with competent or relevant evidence of any mental defect or treatment at a time probatively related to the time period about which he was attempting to testify."

To the same effect are *United States v. Hiss,* 88 F.Supp. 559 (S.D.N.Y. 1950), and statements in *United States v. Honneus,* 508 F.2d 566, 573 (1 Cir. 1974), *cert. denied,* 421 U.S. 948, 95 S.Ct. 1677, 44 L.Ed.2d 101 (1975); *Sinclair v. Turner,* 447 F.2d 1158, 1163 (10 Cir. 1971), *cert. denied,* 405 U.S. 1048, 92 S.Ct. 1329, 31 L.Ed.2d 590 (1972); *Ramseyer v. General Motors Corp.,* 417 F.2d 859, 863 (8 Cir. 1969); *United States v. Allegretti,* 340 F.2d 254, 257 (7 Cir. 1964), *cert. denied,* 381 U.S. 911, 85 S.Ct. 1531, 14 L.Ed.2d 433 (1965).

In *United States v. Figurski,* 545 F.2d 389 (4 Cir. 1976), we had occasion to determine whether the contents of a protected report about a key prosecution witness should have been disclosed to defense counsel, and stated:

> "If the report contains only material impeaching the witness, disclosure is required only when there is a reasonable likelihood of affecting the trier of the fact. Whether there is such a likelihood depends upon a number of factors such as the importance of the witness to the government's case, the extent to which the witness has already been impeached, and the significance of the new impeaching material on the witness' credibility."

Id., at 391-92. As discussed above, the former vice-president of Payless was the key government witness. Although the defense presented the testimony of two witnesses that contradicted his testimony regarding Ashland's control over its subsidiaries, the ability of defense counsel to impeach him regarding his ability to properly perceive events about which he testified was severely limited by counsel's inability to examine the hospital records. We can think of no more relevant or significant material than a hospital record indicating that a witness who is testifying against his former employer had been under treatment for mental illness which rendered him at that time delusional and hallucinatory with poor judgment and insight. Although a trial court should seek to prevent the disclosure of embarrassing, irrelevant information concerning a witness, it is an abuse of discretion to preclude defense counsel from obtaining relevant information, and the witness' privacy must yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case. *See Davis v. Alaska,* 415 U.S. 308, 319, 94 S.Ct. 1105, 1111-1112, 39 L.Ed.2d 347 (1974).

Upon careful consideration, we are of the opinion that the action of the district court in denying Ashland access to the hospital records for its use in cross-examination of the former vice-president was so prejudicial that Ashland is entitled to reversal and a new trial.

VII

With the exception of Ashland, we affirm the convictions of the other corporate appellants. We think, however, that assurances of immunity given to Robert Cavin during the grand jury's investigation and upon which he relied require that his conviction be set aside.

The grand jury investigation was initiated about November 18, 1974, under the direction of Rodney A. Thorson of the Anti-trust Division of the Department of Justice. On December 23, 1974, Cavin and Richard Reynolds, a fellow employee of SIGMA, were subpoenaed to testify before the grand jury and were jointly notified that they should appear in Baltimore on January 7, 1975. Reynolds and Cavin immediately contacted David A. Donohoe, who also represented SIGMA, and arranged to meet with him on January 2, 1975. Donohoe then called Thorson and inquired whether either Cavin or Reynolds were targets of the grand jury investigation. According to Donohoe, Thorson told him "not to worry" because Thorson "was obtaining immunity orders for both Mr. Cavin and Mr. Reynolds and that both would be testifying under a grant of immunity." Based upon Thorson's representation Donohoe concluded that he should suggest to Cavin and Reynolds that they obtain other counsel. In Thorson's recollection of the conversation with Donohoe, he denied making any "promise" that Cavin and Reynolds would receive immunity but recalled stating that he would obtain immunity orders for both if they intended to claim the Fifth Amendment. Thorson also acknowledged that he had requested immunity authorization for both witnesses at about the time he issued subpoenas for their appearance. Thorson also discussed with Donohoe his possible conflict of interest since he was counsel for SIGMA and suggested that Donohoe secure other counsel for Cavin and Reynolds.

At their meeting on January 2, 1975, Donohoe told Cavin and Reynolds of Thorson's assurance that they were to receive immunity, and advised them to obtain other counsel in order to

avoid any possible conflict of interest. After some discussion, Donohoe recommended that Cavin and Reynolds consider retaining Donald T. Bucklin. Bucklin met with Cavin and Reynolds at Donohoe's office on that same day and was retained by them. Donohoe repeated to Bucklin the representations concerning immunity that Thorson had made to him. In the light of this information Bucklin discussed with Cavin and Reynolds their rights under a grant of immunity and they were specifically advised of the importance of testifying fully and honestly in order to obtain the maximum protection under 18 U.S.C. § 6001, *et seq.*

Shortly after the start of a joint briefing session with Cavin and Reynolds on the afternoon of January 2nd, Bucklin called Thorson to advise him of his representation of the two witnesses and to set up a meeting on January 3rd. During this conversation Thorson confirmed the assurance that both Cavin and Reynolds would receive immunity, and was advised by Bucklin that based upon this assurance he perceived no conflict in his joint representation. Thorson agreed that no conflict existed. While Thorson later denied discussing the question of conflict with Bucklin, he did acknowledge that he had repeated his earlier assurance that he would obtain immunity orders if the witnesses intended to claim the Fifth Amendment. On this point Thorson testified before the district court as follows:

> THE COURT: Did you state that he would get immunity; he would testify pursuant to an immunity order?
>
> MR. THORSON: Yes; yes, I did state that.
>
> THE COURT: Can you restate that to me to the best of your recollection as to when it occurred and what was said and to whom.
>
> MR. THORSON: I stated that initially in the telephone conversation preceding the January 3rd meeting in the context that if it is their intention to claim the Fifth Amendment I will obtain an immunity order. And I explained, expressly, that I had no intentions of having the

> Government go to the expense of having these people come to Baltimore from St. Louis, and then claim the Fifth Amendment and then I'd send them home. That's why I wanted to know what their intention was, and I did not find that out until the meeting on Friday. [January 3].

(App. Vol. 18, at 15,225 and 15,226.)

During the initial joint interview with Bucklin on January 3rd Cavin and Reynolds refreshed each other's recollections, supplemented their respective comments and responses, and corrected each other's memory of events, dates and names of people with respect to incriminating evidence. On January 3, 1975, Donohoe and Bucklin, together with another attorney, met with Thorson and other prosecutors in the Department of Justice. At this meeting Thorson agreed to obtain immunity orders prior to the grand jury appearances of Cavin and Reynolds based upon the representations that both witnesses would claim their Fifth Amendment privilege.

Subsequent to the meeting on January 3rd, a conflict developed in Bucklin's schedule for January 7th, and Terry F. Lenzner was brought into the case to represent Cavin and Reynolds. On January 6th Thorson called Lenzner and advised him that the appearance of the two witnesses was postponed until January 8th. During that conversation Thorson again confirmed that both witnesses would receive immunity, and it was agreed that the attorneys would meet on the morning of January 8th and proceed to the supervisory judge's chambers for the signing of the immunity orders. At about 7:30 p.m. on that evening Thorson called Lenzner at his home and advised him that the subpoena for Cavin was being cancelled. The reason given by Thorson for the cancellation was a scheduling problem and Lenzner was told that he would be advised if and when Cavin's appearance was rescheduled.

Under date of January 7, 1975, Lenzner advised Thorson by letter that his representation of Cavin and Reynolds was based upon Thorson's assurance that both individuals were to testify under a grant of immunity on the same day, and that

because of a possible conflict of interest resulting from the cancellation of Cavin's subpoena, Lenzner was withdrawing from further representation of Cavin. Lenzner was unable to advise Cavin of these developments since both Cavin and Reynolds were en route to Washington. Cavin expressed some concern about the postponement but was assured by Lenzner that Thorson had indicated it was due only to a scheduling problem.

At the grand jury session on January 8th Thorson commenced his examination of Reynolds concerning SIGMA documents without an immunity order, whereupon Reynolds refused to answer "on the grounds that it violates the agreement between the Government and my counsel that I would be questioned only after receiving immunity and that I would be granted immunity today before testifying." Thorson then called upon Donohoe to produce someone to identify the SIGMA records, and the following exchange took place:

> MR. THORSON: Well, do I understand that you, as counsel for SIGMA are refusing on behalf of SIGMA to produce someone—
>
> MR. DONOHOE: No, I'm not.
>
> MR. THORSON: —from that association to come here and testify, take an oath and testify as to the document production?
>
> MR. DONOHOE: I think you know perfectly well what I'm saying. I brought two people to this City pursuant to subpoenas that you had directed, so I had two people who could have testified with respect to these documents, but because the commitments that you had made to these two individuals have not been kept, I'm no longer able to go get a third or fourth or fifth person. That's a situation which is not of my making.
>
> MR. THORSON: Do I understand that you are refusing at this juncture to provide a person to make that production?

MR. DONOHOE: All I'm saying is that there are two people that have- hat I have brought that are capable to do that, but I'm willing to assure you that it won't do you any good because you failed to keep your commitment to obtain a proper order from the Court. You can take Mr. Reynolds or Mr. Cavin in here, but it's not going to do any good.

MR. THORSON: Mr. Donohoe, I think you can take SIGMA's documents with you now and would you so instruct, if he is your client, would you instruct Mr. Reynolds to appear before the Grand Jury now?

(App. Vol. 8, at M86 and M87.)

Reynolds was formally granted immunity later that day and testified before the grand jury. In his affidavit, Reynolds stated that during his grand jury appearances he was questioned and testified about matters he had earlier discussed with Cavin and that his testimony, at least in part, was based upon information Cavin had given him after they were told that both would receive immunity. In the process of obtaining an immunity order for Reynolds, Thorson showed Lenzner a document which reflected an authorization of immunity for both Cavin and Reynolds, and Lenzner concluded that Cavin was to be called later to testify under a grant of immunity. Under these circumstances, he perceived no conflict of interest, and debriefed Reynolds fully in the presence of Cavin. Some fourteen months later, in March of 1976, Reynolds was recalled as a witness before the grand jury and again discussed his testimony with Cavin, acting under the belief that neither he nor Cavin would be indicted. On June 1, 1976, Cavin was named as a defendant in the indictment.

These facts were largely undisputed and Cavin filed a motion in the district court alleging that the Government's conduct warranted dismissal of the indictment as to him. The court denied this motion, and Cavin filed an appeal. We dismissed the appeal, holding that the denial of the dismissal

motion was not an appealable final decision within the meaning of section 1291. *United States v. Cavin,* 553 F.2d 871 (1977).

Our review of the record persuades us that the conduct of the Government cannot withstand the scrutiny of *Cooper v. United States,* 594 F.2d 12 (4 Cir. 1979), and *United States v. Carter,* 454 F.2d 426 (4 Cir. 1972). In *Carter,* the defendant alleged that incident to a plea bargain with the United States Attorney's office in the District of Columbia, involving certain stolen checks, he was promised that he would not be prosecuted elsewhere for anything having to do with the checks. We held that if such a promise was made as alleged and the defendant relied upon it, it was binding upon the Government and barred any subsequent prosecution for the stolen checks in the Eastern District of Virginia. We approved and applied the holding of *United States v. Paiva,* 294 F.Supp. 742 (D.D.C. 1969), that

> "if, after having utilized its discretion to strike bargains with potential defendants, the Government seeks to avoid those arrangements by using the courts, its decision so to do will come under scrutiny. If it further appears that the defendant, to his prejudice, performed his part of the agreement while the Government did not, the indictment may be dismissed,"

294 F.Supp. at 747.

In considering Cavin's dismissal motion, the district judge recognized that the principles of *Carter* were controlling, but concluded there was no promise of immunity by the Government, and "that Cavin (1) did not rely on the alleged promise and (2) to the extent such reliance is claimed it was not reasonable." In our opinion, the record does not support either of these conclusions. In reaching this conclusion, we hasten to point out that this is not a case of subjective wishful thinking on the part of either Cavin or his counsel. It is undisputed that the assurance of immunity was first given to Donohoe by Thorson in their telephone conversation on December 23, 1974, and was communicated to Cavin and Reynolds at that time. In the light of such assurance, from that date on Cavin's conduct and

especially his interchange of information with Reynolds was influenced by the anticipated immunity. Donohoe recognized the validity of the promise when he resigned as counsel for Reynolds and Cavin due to the apparent conflict between them and SIGMA. As successor counsel for the witnesses, Bucklin had been advised of the immunity by Donohoe and received direct assurance to that effect from Thorson on the afternoon of January 2nd. Assuredly, Bucklin considered the promise to be viable when he conducted his joint conferences and briefings of Cavin and Reynolds in reliance thereon. Finally, on January 6th Thorson confirmed to Lenzner that both witnesses would receive immunity.

In giving these successive assurances to Cavin's attorneys, Thorson knew or certainly should have known, that both Cavin and his counsel would rely upon them and govern their conduct accordingly. The constitutional overtones of such a situation were recognized by Judge Phillips in *Cooper v. United States, supra:*

> "To the extent that the government attempts through defendant's counsel to change or retract positions earlier communicated, a defendant's confidence in his counsel's capability and professional responsibility, as well as in the government's reliability, are necessarily jeopardized and the effectiveness of counsel's assistance easily compromised. [Footnote omitted] At the very least, these Sixth Amendment considerations add a heightened degree of obligation to the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas."

594 F.2d at 18, 19.

In concluding that Cavin's reliance upon the promise of immunity was unreasonable the district judge, drawing upon the law of promissory estoppel, observed that Thorson's assurance of immunity was a statement "of present intention subject to change for numerous reasons." Focusing upon Bucklin as an experienced attorney, the court charged him "with knowledge of the many variables involved in the immunity process," and

concluded that "given these considerations and the facts of this case, reliance upon a purported promise of immunity before an immunity order has been signed and one has actually testified before the grand jury is manifestly risky and hence unreasonable." In our opinion the fallacy of this conclusion is that we are not primarily concerned with the gauge of Bucklin's professional caution or responsibility. The question is whether Cavin, as a layman, acted reasonably in relying upon Thorson's assurances of immunity, and our appraisal of such reliance should not be made on the basis of any fine-fingered legal analysis. As we observed in *Cooper:*

> "constitutional decisions cannot be made to turn in favor of the government on the fortuities of communications or on a refusal to accord any substantive value to reasonably induced expectations that government will honor its firmly advanced proposals."

594 F.2d at 17. In our opinion the record in this case clearly required a finding that Cavin acted reasonably in relying upon the Government's promise of immunity.

Although he had found that there was no promise of immunity, nor any reasonable reliance by Cavin upon any such alleged promise, the district judge recognized the existence of a serious question with respect to Reynolds' testimony at trial. When counsel for the Government advised the court that he intended to use Reynolds to incriminate Cavin the court observed: "To the extent that Mr. Reynolds does not have an independent recollection of any statement that Mr. Cavin made to him and acquired that recollection through the so-called briefing, if that is what it was, it seems to me that that statement might well be suppressed." In discussing the procedure to carry out this ruling, the court advised counsel that he would "take it on a line-by-line basis" as the trial progressed. An examination of the record discloses that Reynolds' recollection covering several years was inextricably intertwined with the information which he had received from Cavin concerning SIGMA's operations either in the joint briefing sessions or otherwise. This

was illustrated when, during the course of his testimony, he stated: "My own independent recollection—I have been briefed and debriefed, before the Grand Jury and quizzed and re-quizzed, and I am not sure what is my own independent recollection." (App. Vol. 5 at 1477). In our opinion, the Government's use of Reynolds as its principal witness against Cavin after the two of them, acting pursuant to the assurances of immunity, had worked together so closely in their review of SIGMA's operations was violative of the basic concept of fundamental fairness. The lodestar of *Carter* was stated by Judge Winter as follows:

> "There is more at stake than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government."

454 F.2d, *supra,* at 428.

In our original opinion we concluded that the fair administration of justice required not only that Cavin's conviction be reversed but that the case be remanded with instructions to dismiss the charges against him. Upon reconsideration, however, we are of the opinion that this relief was too broad and was at variance with the observations made by us in *United States v. Cavin, supra.* In the course of our consideration of Cavin's abortive appeal we stated:

> "In contrast to the Double Jeopardy Clause's prohibition against retrial, the remedy to vindicate the Fifth Amendment's protection against self-incrimination is much more circumscribed. One who claims that his confession or other incriminatory statements have been illegally obtained by promises of leniency, deception, or coercion is not entitled to avoid trial by securing dismissal of his indictment. His remedy is suppression of his statement."

553 F.2d, at 873.

This observation accords with the pronouncements of the Supreme Court in this area. *See United States v. Blue,* 384 U.S. 251, 255, 86 S.Ct. 1416, 1419, 16 L.Ed.2d 510 (1966); *Lawn v. United States,* 355 U.S. 339, 348-50, 78 S.Ct. 311, 317-318, 2 L.Ed.2d 321 (1958).

Unlike the situation in *Carter, supra,* the Government made no promise to Cavin that he would not be prosecuted. The record indicates only that the Government assured Cavin of immunity, and the only type of immunity which could have been offered to him was that prescribed by 18 U.S.C. § 6002. The statute authorizes only use immunity, not transactional immunity, and the grant of use immunity does not justify dismissal of the indictment. If it elects to do so, the Government can still proceed with the prosecution but cannot use any evidence or the derivative of any evidence which it has obtained through the grant of immunity. "[S]uch immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader." *Kastigar v. United States,* 406 U.S. 441, 453, 92 S.Ct. 1653, 1661, 32 L.Ed.2d 212 (1972).

Accordingly, Cavin's conviction is reversed and his case is remanded to the district court for a new trial if the Government so elects. In the event of a new trial the district court should not permit the Government to offer any evidence directly or indirectly derived from Cavin which resulted from its assurance of immunity to him and Reynolds.

AFFIRMED IN PART;
REVERSED IN PART;
AND REMANDED.

leads me to the conclusion that by permitting a transcript of a recorded tape to be introduced into evidence or by permitting its use as an aid, undue emphasis is placed on the testimony represented by the tape recording, and amounts to nothing more than the transcription for the jury of the testimony of one witness to the exclusion of that of others. I think our rule on this question is incorrect and would have granted rehearing en banc, changed the rule, and awarded a new trial on this account.

Having received not near enough support to prevail on the proposition voiced just above, I have not dissented, and make no attempt to detract from the opinion except to voice my disagreement with the established circuit rule.

HALL, Circuit Judge, dissenting in part:

The majority has concluded that Ashland Oil was entitled to reversal and a new trial because the hospital records of a key government witness were not made available for use in cross examination. I respectfully dissent. In my opinion, the district court acted within its discretion to protect the rights of all parties involved.

As the majority observes, the trial judge reviewed the records *in camera* and advised counsel that they revealed two periods of hospitalization, the first being from July 26 to August 29, 1966, and the second from November 20 until December 24, 1968. The judge correctly advised counsel that the hospitalizations involved a "mental disorder or illness." Acknowledging that the government's examination might enter the periods of hospitalization, the judge clearly gave Ashland the option to cross examine the witness about his hospitalizations. The judge also gave the following assurance:

> "If it appears to me that the witness answers any questions in a manner which the records contradict, then I will consider, of course, making that particular bit of information from the psychiatric records available to you;

WIDENER, Circuit Judge, concurring:

While I concur in the opinion, I would add a word.

At trial, the prosecution played to the jury a tape recording of an alleged telephone conversation between one Joseph Painter, a government witness and former employee of Hess, and Norman Goldberg, former marketing coordinator for defendant Amerada Hess Corporation. The government contended that this conversation was evidence of the price-fixing conspiracy. Although numerous parts of the tape were inaudible,[1] the government was not only allowed to introduce into evidence the tape but was also allowed to give to the jury, not as evidence but as an "aid," a transcript of the tape, the origin of which transcript was not certain and which in plain terms was merely a statement of what someone (apparently the transcriber) thought the tape said.

The prosecution was also allowed to introduce a controversial tape of a speech made at a SIGMA meeting by one Teak, the Executive Director of SIGMA, who was deceased at the time of trial, and a transcript of the tape, the origin of which transcript was also not definitely determined. This Teak tape, only parts of which were played to the jury, was extremely damaging to the defendants' case.

Where a tape recording has been made of an admissible conversation, even if the tape may be admissible, I feel that a transcript of the tape should not be. Neither should it go to the jury as an "aid." Although our decision in this case, while not in terms, follows the circuit rule that such transcripts are admissible, *United States v. Hall,* 342 F.2d 849 (4th Cir. 1965), I think it is quite unfair and prejudicial to the party against whom the evidence contained on the tape is offered. It is known by all that a paper writing adds a kind of authenticity to any statement. In addition, the jury has access to that testimony while in the jury room, if admitted into evidence. All of this

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[1] Joint Appendix Vol. 7, p. 1966-1975 reveals 119 inaudible portions in 9½ pages of transcript. *Hall,* infra, had 25% inaudible, p. 853.

not giving you the records, but advising you in that respect what it is.

* * * *

In the event the witness answers in ways that I would believe to be contradicted by the records in any way, I would call that to your attention, * * *."

(App. Vol. 3, at 779).

Having reviewed the witness' testimony and the hospital records, I discern no reversible error. The hospital records had no bearing upon the witness' competency to testify at the time of trial. At best, they would only show that his judgment at the very beginning of the conspiracy period might have been impaired a matter which was adequately revealed to the jury on cross-examination. Two periods of psychiatric hospitalization necessarily indicate that a patient's judgment at that time and possibly for some period thereafter would be somewhat impaired, and the jury was well aware of this fact and its implications. Additionally, and significantly, I think, counsel for Ashland failed to avail themselves of the offer of Judge Blair to cross-examine the witness on the possible effect his illness had on his perceptive abilities and his attitude toward his colleagues in Payless and Ashland during the operative period. The failure to make such an exploration cannot be attributed to the lack of the hospital records for counsel vigorously questioned the former officer concerning his hostility toward his colleagues and Ashland indicated in argument to the district court its awareness that paranoia might have colored the witness' perception.

I think that the district judge acted appropriately and discreetly in declining to open up the hospital records in their entirety. These are typical hospital records, with some of the entries being handwritten and others typed; some legible and other illegible; they include nurses' notes, tentative diagnoses and comments by the physician, as well as notations of medication and treatment. To place all of this material in an

intelligent perspective, both as it related to the period of the conspiracy and the time of the witness' appearance in court, would have required expert testimony. At the time of trial the attending physician was deceased, and the introduction of this material would merely have led the jury into a confusing collateral thicket. Whether such an excursion should be permitted rested in the sound discretion of the trial judge and in my opinion, he properly declined to countenance it. Based upon my examination of the record, I perceive no "reasonable likelihood" that the hospital records would have had any material effect upon the jury's determination of the issues in this case. *See United States v. Figurski,* 545 F.2d 389, 391 (4th Cir. 1976).

I concur in the remaining parts of Judge Field's opinion.

No. 77-2519

UNITED STATES OF AMERICA,
Appellee,

versus

THE MEADVILLE CORPORATION,
Appellant.

No. 77-2520

UNITED STATES OF AMERICA,
Appellee,

versus

PETROLEUM MARKETING CORPORATION,
Appellant.

No. 77-2521

UNITED STATES OF AMERICA,
Appellee,

versus

ROBERT R. CAVIN,
Appellant.

Upon motion of the appellants, by counsel, and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed for an additional 30 days, to and including November 4, 1980, pending application of the appellants in the Supreme Court of the United States for a writ of certiorari to this Court.

For the Court—by Direction.

/s/ WILLIAM K. SLATE, II
Clerk

Supreme Court, U.S.
FILED
DEC 2 1980
MICHAEL RODAK, JR., CLERK

Nos. 80-594 and 80-605

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERADA HESS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

KAYO OIL COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-594

AMERADA HESS CORPORATION, PETITIONER

v.

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No. 80-605

KAYO OIL COMPANY, ET AL., PETITIONERS

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the indictment should have been dismissed because of preindictment delay where the district court found that the alleged delay was not intentional and did not prejudice petitioners.

2. Whether petitioners' Sixth Amendment right to be informed of the nature and cause of the accusation was violated.

3. Whether petitioners were deprived of a fair trial by the publication of an accurate newspaper account of the decision in a civil antitrust case involving a co-defendant who was ultimately acquitted by the jury.

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OPINIONS BELOW

The opinion of the court of appeals on rehearing (Pet. App. 1a-29a)[1] is reported at 624 F.2d 461. The memorandum and order of the district court denying the motion to dismiss the indictment (Pet. App. 29a-43a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1980. A petition for rehearing was denied on August 5, 1980. On September 30, 1980, the Chief Justice extended the time for filing the petitions for a writ of certiorari to and including October 14, 1980, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioners were convicted of a price fixing conspiracy, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.[2] They

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[1] "Pet. App." refers to the appendix in No. 80-605.

[2] In addition to petitioners, four corporations, the Society of Independent Gasoline Marketers of America (SIGMA), Ashland Oil, Inc., Continental Oil Company, Crown Central Petroleum, and four individual defendants, Robert R. Cavin, Norman Goldberg, Charles J. Luellen, and W. H. Burnap, were charged. Cavin was convicted, but the other individual defendants were acquitted by the court at the conclusion of the government's case. SIGMA and Ashland were convicted, but Crown Central and Continental were acquitted by the jury.

were each fined $50,000. These convictions were affirmed by the court of appeals (Pet. App. 1a-29a).[3]

The evidence at trial showed that petitioners engaged in a conspiracy to coordinate price increases, eliminate discounts, and settle price disputes in the Middle Atlantic States (Pet. App. 5a, 8a). The agreement to fix prices was proved through the testimony of numerous witnesses, many of whom were employees of the various defendants, and supported by the defendants' own contemporaneous records (*id.* at 8a). These witnesses testified, and various records confirmed, that petitioners and others communicated with each other on a continuing basis in order to maintain prices in local markets at stable levels approximately two cents per gallon below the prices charged by the so-called "major brand" stations. See, *e.g.*, J.A. 257, 260, 271-272, 275, 282-286, 580-582, 604-606, 609, 2090-2094, 2102, 2875-2876.[4] To implement this agreement, petitioners and others not only coordinated price changes but negotiated to end price wars among themselves. See, *e.g.*, J.A. 257, 580-582, 604-606, 2090-2094, 3112.

2. In affirming petitioners' convictions (Pet. App. 6a-9a),[5] the court of appeals held that "the evidence was sufficient to support the conclusion of the jury that the defendants were working together for the accomplishment of their common purpose to fix prices

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[3] The convictions of Cavin and Ashland were reversed for reasons unrelated to the questions presented in these petitions (Pet. App. 9a-25a).

[4] "J.A." refers to the joint appendix in the court of appeals.

[5] An earlier opinion of the court of appeals, affirming Ashland's conviction as well as petitioners', was withdrawn on petition for rehearing, and the instant opinion was substituted (see Pet. App. 3a).

within the geographical area described in the indictment" (*id.* at 8a). The court also rejected petitioners' claims that the court's instructions varied from the indictment and that the proof varied from the indictment, the bill of particulars and the pretrial stipulation of the parties (*id.* at 8a-9a). Finally, in light of the government's "extensive disclosure" of its case prior to trial, the court held that the district court did not abuse its discretion in denying petitioners' request for a more detailed bill of particulars (*id.* at 9a).

ARGUMENT

1. Petitioners contend (Kayo Pet. 14-22; Hess Pet. 11) that the court of appeals should have dismissed the indictment because of an "unreasonable" preindictment delay caused by the government's "gross negligence." This contention is based primarily on the fact that in 1968 or 1969 a Justice Department attorney was given a tape recording of remarks made during a meeting of SIGMA, an industry trade association, including a speech by Howard Teak, then SIGMA's executive director (Pet. App. 30a). Petitioners contend that the tape recording should have alerted the government to their illegal activities, yet the indictment was not returned until June 1, 1976. This contention does not warrant review by this Court.

At the outset, we note that petitioners did not raise the issue of preindictment delay in the court of appeals, except in a very oblique fashion.[6] The court of

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[6] Petitioners' 197-page joint brief in the court of appeals did not list preindictment delay as an issue presented for review (J.B. 2). There was no separate discussion of the issue nor of any of this Court's decisions on preindictment delay. In the course of their argument that the tape record-

appeals did not discuss the question. It is well established that this Court will not ordinarily review questions not presented to or decided by the court of appeals. See *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958); *Husty* v. *United States*, 282 U.S. 694, 701-702 (1931); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). Review would be particularly inappropriate here because this Court has left "to the lower courts, in the first instance, the task of applying the settled principles of due process [concerning preindictment delay] to the particular circumstances of individual cases." *United States* v. *Lovasco*, 431 U.S. 783, 797 (1977).

In any event, petitioners' claim is without merit. The district court carefully considered the question of preindictment delay and correctly rejected it in an opinion on which we rely (Pet. App. 29a-43a). The court found from the evidence before it that the attorney to whom the Teak tape was given apparently never listened to the tape or turned it over to others prior to his retirement (*id.* at 37a). Thus, an investigation into petitioners' price fixing was not begun until after a private antitrust action was filed against Crown Central in 1973 (*id.* at 33a). The court concluded that the delay in returning the indictment after the delivery of the tape was unintentional—"at best a negligent delay unaccompanied by any improper motivation" (*id.* at 37a). With respect to the shorter delay between the filing of the civil suit and the empanelling of the grand jury, the district court found that it was justified by the government's understand-

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ing should not have been admitted, however, petitioners did discuss the alleged delay in filing the indictment (J.B. 133-135; see Kayo Pet. 14 n.15).

able desire to see if the plaintiffs could carry their burden in a civil suit before framing criminal charges (*id.* at 38a-39a). Finally, apart from any justifications for the delay, the court ruled that the defendants had not shown that they were prejudiced by the delay (*id.* at 40a-42a).[7]

Under the decisions of this Court in *United States* v. *Lovasco*, *supra*, and *United States* v. *Marion*, 404 U.S. 307 (1971), it is clear that the district court correctly ruled that the indictment should not be dismissed because of preindictment delay. In the absence of a showing of actual prejudice, the indictment should not be dismissed. See *United States* v. *Marion*, *supra*, 404 U.S. at 325-326. Moreover, the district court's finding that the delay was "at best negligent" is not clearly erroneous. Indeed, even if the tape had been heard by government attorneys in 1969, petitioners would have no basis for complaint. Petitioners have characterized Teak's remarks as "sometimes incoherent and always ambiguous" (Pet. 20); thus they should not be heard to complain that

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[7] Petitioners alleged that they were prejudiced because of Teak's death in 1972. The court observed that the record of Teak's activities was "amply preserved" because the persons with whom he communicated on pricing could be called as witnesses (Pet. App. 41a). As for the death of other possible SIGMA witnesses, there was "no showing that they could have offered exculpatory evidence not merely cumulative of that which the many witnesses who are alive may offer" (*ibid.*). Lastly, the district court rejected petitioners' claim that they were prejudiced by their claimed destruction of documents. The court was "highly skeptical that documents of such importance would be destroyed by companies of [petitioners'] size and sophistication" (*id.* at 42a). The court concluded that no "meaningful impairment of [petitioners'] ability to defend themselves appears" (*ibid.*).

the government was "grossly negligent" in not instituting a prosecution immediately after being furnished with the tape recording. See *United States* v. *Lovasco, supra,* 431 U.S. at 791.

2. Petitioners contend (Kayo Pet. 22-28; Hess Pet. 11) that they were not informed that the prosecution would introduce evidence of local price fixing incidents and thus that their Sixth Amendment right to be informed of the nature and cause of the accusation against them was denied. The court of appeals flatly rejected this contention, finding that "the charges and specifications found within the four corners of the indictment, the bill of particulars, and the pretrial stipulation not only informed the defendants of the charges against them, but are sufficiently clear to allow the defendants to assert double jeopardy in the event of any future prosecution for the same conduct" (Pet. App. 9a). In addition, the court rejected the contention that the district court erred in denying a motion for a more detailed bill of particulars (*ibid.*). The record fully supports the court of appeals' decision.

The indictment specifically charged that the conspirators not only coordinated general price increases but also conspired to "eliminate discounting and settle pricing disputes" in the local markets within the Middle Atlantic States in which they did business (Pet. App. 5a; J.A. M116). The bill of particulars also identified conspiratorial acts, including acts of local price fixing by individual co-conspirators (Bill of Particulars, at 3 ¶ (b), (iii)-(v) (J.A. M298)), and the grand jury materials and documents disclosed to defendants prior to trial discussed at length most,

if not all, of the local pricing disputes subsequently discussed by government witnesses at trial.[8]

Petitioners suggest that certain remarks of the prosecutor during the pretrial proceedings led them to believe that evidence of local pricing would not be admitted (see Kayo Pet. 10). In fact, the prosecutor, in opposing a motion for a postponement, simply explained that an exhaustive compilation of "every price in every station" (J.A. 15,180) was irrelevant to the defense because the Sherman Act requires a showing only of an agreement to fix prices, not price uniformity (J.A. 15,180-15,181). There was certainly no promise not to introduce local pricing evidence.[9]

Petitioners also contend (Kayo Pet. 26) that the government violated a pretrial stipulation to disclose its "intended trial exhibits" prior to trial by failing to turn over exhibits relating to local prices. This contention is without merit. Pursuant to this stipulation, 2,795 exhibits, including the defendants' pricing and telephone records, were furnished to the defendants prior to trial.[10] Not surprisingly for a

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[8] That petitioners were not surprised by the government's introduction of evidence concerning local pricing disputes is apparent from their failure to object to the prosecutor's opening statement at trial when he clearly stated that such evidence would be presented (J.A. 167-168, see also J.A. 177, Tr. 1443). Indeed, even defense counsel referred to local pricing evidence during their opening statements (Tr. 1482-1483, 1486-1487, 1501-1502, 1509).

[9] In fact, petitioners made no objection at trial to the court's instruction that the jury could find that local pricing disputes were "resolved as a result of the conspiracy charged in the indictment" (J.A. 15,102).

[10] In addition, petitioners were provided with all grand jury testimony; access to all documents subpoenaed from or volun-

case of this size, the government was unable to anticipate fully all the exhibits it would use at trial. Moreover, many of the government's witnesses were hostile to the prosecution, and it became necessary to introduce additional documentary evidence to clarify their testimony. As a result, the district court admitted into evidence 104 government exhibits that had not previously been designated as *intended* trial exhibits. The court specifically found that the use of those exhibits did not violate the stipulation (see, *e.g.*, J.A. 223-225). Most of these exhibits related directly to instances and events that were quite familiar to petitioners by virtue of the earlier discovery,[11] and petitioners never requested a continuance to consider the

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tarily submitted by non-defendants; all *Brady* and Jencks Act materials; and a list of intended witnesses (Pet. App. 9a). The bill of particulars for each defendant specified persons among whom the first exchanges or discussion involving the conspiracy would have taken place, as best the government could determine them (J.A. M296-M317). Where the first act of participation in the conspiracy involved the authorization or direction of a subordinate, the individuals so authorized were listed (*ibid.*). The bill of particulars also listed the dates during which each appellant participated in the conspiracy and enumerated the persons by whose act their corporate employers joined or continued participation in the conspiracy (*ibid.*).

[11] Moreover, contrary to petitioners' suggestion (Kayo Pet. 26), these exhibits did not relate solely to local pricing. Some dealt with major price restorations (see J.A. A1112, A1238-A1249, A1584, GX159-163). Others merely corroborated or clarified the testimony of government witnesses or documents already in evidence (see J.A. A1250-A1262, A1490-A1515, A1524-A1527). A number of the documents concerned defendants who were acquitted by the jury (J.A. A1117-A1121, A1179-A1181, A1250-A1258, A1494-A1514, A1524-A1526, A1592-A1595, A1597-A1603, A1728-A1730, A1734-A1738).

exhibits that had not previously been disclosed. See *United States* v. *Andrews*, 381 F.2d 377, 378 (2d Cir. 1967), cert. denied, 390 U.S. 960 (1968). Therefore, the introduction of the exhibits did not unfairly surprise petitioners.[12]

3. Petitioners also contend (Hess Pet. 12-16; Kayo Pet. 29) that they were deprived of a fair trial because the jury was prejudiced by pretrial publicity. This contention is without foundation.

Petitioners' claim is based on a single newspaper article that appeared on an inside page of a local newspaper after the close of the evidence but before the jury received its instructions. The article accurately reported the decision of another federal judge in a civil antitrust suit finding Crown Central liable for price fixing. The only mention of petitioners in the article is in the eleventh paragraph where it is noted that a Justice Department probe led to the indictment of petitioners, among others.[13]

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[12] *United States* v. *Flom*, 558 F.2d 1179, 1185-1186 (5th Cir. 1977), on which petitioners rely (Kayo Pet. 27-28 n.28), is inapposite. In *Flom*, the prosecution had represented in its bill of particulars that it had no evidence of particular contracts and then later introduced such evidence at trial. Here, by contrast, the courts below found that the government's proof did not vary from the bill of particulars (Pet. App. 9a) and that the stipulation concerning intended trial exhibits was not violated (J.A. 223-225).

[13] The article also noted a reference by the court to the pending criminal case—that it felt the case against Crown Central had been proved by a preponderance of the evidence, "whether or not" the jury in the criminal case is convinced that it is proved beyond a reasonable doubt. This remark clearly declined to express an opinion on Crown Central's criminal culpability and, of course, made no reference at all to petitioners.

There is no possibility that this newspaper article influenced the jury's verdict. First, Crown Central itself, the only defendant with which the article was concerned, was acquitted by the jury. Moreover, after the article was brought to the district court's attention, the court asked the jury whether any of them had been exposed, even inadvertently, to "any news reports or anything of that kind * * * either about this case or about any of the parties to this case * * *" (J.A. 15,055-15,057). None of the jurors indicated that he had seen any news account.[14] In these circumstances, it is apparent that the jury was not prejudiced by the article.[15]

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[14] The court had repeatedly instructed the jury throughout the trial that they were "not to view, read or listen to any kind of a news account concerning this case" (see, *e.g.*, J.A. 156).

[15] Petitioners argue (Hess Pet. 9-10, 15) that the manner in which the questions were asked—"has anyone advertently or inadvertently violated" the instructions concerning reading or viewing news accounts of the case (J.A. 15,056)—threatened the jurors with being held in contempt and might not have elicited a truthful response. There is no basis for this assertion. A juror certainly could have indicated he "inadvertently" read the article in question without any fear of a contempt citation, and, in fact, at an earlier point in the trial, one juror did inform the court that he had inadvertently been exposed to a news report (J.A. 3284-3287).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1980

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-594

AMERADA HESS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Reply to Respondent's Opposition to Petition for a Writ of Certiorari

Respondent's brief addresses a question not even raised by the petition for certiorari. Respondent asserts (p. 9) that the petition is

> "based on a single newspaper article that appeared on an inside page of a local newspaper after the close of the evidence but before the jury received its instructions"

as if to suggest that this is just another case raising again the issue whether newspaper publicity before or during the trial is sufficiently prejudicial to deprive a defendant of a fair trial.

Respondent has simply ignored the thrust of this petition. What distinguishes this case is the fact that the prejudicial publicity was created and published by, or with the approval of, two federal district judges sitting in different, simultaneously pending cases, one civil, the other criminal. The publicity was unique, and devastating, because it expressed the opinion of the district court itself as to defendant's guilty participation in the alleged price fixing conspiracy, the very issue on trial in the criminal case.

As the criminal trial was nearing its conclusion, Judge Harvey, sitting in the civil action, wrote an opinion on an evidentiary question on remand from the Fourth Circuit containing extended and totally gratuitous discussion linking the criminal case to the civil, and expressing the judge's personal opinion about the defendant's guilt. Judge Harvey's chambers then released the opinion *to the press* (which had been covering the criminal trial daily) without notice to any parties and without even filing it in the Clerk's office. In so doing, the district court violated the most fundamental principles which govern the conduct of lawyers and, *a fortiori,* of judges. There is simply no way to condone such behavior, and respondent attempts none in this Court.

The district judge presiding at the criminal trial, Judge Blair, reviewed Judge Harvey's opinion in advance and approved its issuance despite the inflammatory language. After the article appeared, Judge Blair denied a defense motion to inquire into the circumstances of the release of the opinion to the press and waited some five days before making any inquiry of the jury about their exposure to publicity. But even then the court, rather than probing for the facts, posed a barrage of threatening questions, in effect requiring the jury to admit a contempt of court. The judge also entered a gag order precluding any interrogation or investigation of this point by counsel.

Respondent speculates in retrospect that there was "no possibility that the newspaper article in question influenced the jury's verdict," arguing that Crown was acquitted and that the district court's interrogation was proper. Such speculation does not suffice. It is just as plausible to argue that the jury, having seen the article, concluded that Crown, a favored local Baltimore marketer, had already been held liable once and thus should not be convicted in the criminal proceeding; or that the jury acquitted Crown precisely to avoid an inference that the publicity affected their verdict. The simple point is that no one knows the basis for the jury's verdict on Crown or the considerations that influenced the jury, because the district court foreclosed any such inquiry.

This case is unique among decisions involving trial publicity in that the article which appeared in the *Baltimore Sun* bore the imprimatur of the district court itself on the very issue on trial in the criminal case. The highly prejudicial character of Judge Harvey's opinion and the resulting publicity is incontestable, and there is no dispute as to the facts regarding the conduct of the district judges. The issue was fully documented and briefed initially and on rehearing in the court of appeals, which ignored the matter.

The petition is premised on this Court's power of review over the federal judiciary. The significance of the question presented transcends the specific incident of judicial misconduct and the particular interests of the parties to this proceeding. At issue is nothing less than the integrity of the judicial process.

Respectfully submitted,

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